

(2017) 02 DEL CK 0172

In the Delhi High Court

Case No : LPA 255 of 2016 and C.M.No. 14618 of 2016

M/s Strategic Energy Technology Systems Private Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-02-2017

Acts Referred:

Citation : (2017) 2 ADDelhi 569 : (2017) 2 BC 682 : (2017) 238 DLT 425 : (2017) 162 DRJ 329

Hon'ble Judges : Ms. G. Rohini, CJ. and Ms. Sangita Dhingra Sehgal, J.

Bench : Division Bench

Advocate : Mr. Gopal Jain, Sr. Advocate with Mr. Siddharth Sharma, Mr. Abhishek Roy, Ms. Trishala Kulkarni and Ms. Nandini Gore, Advocates, for the Petitioner; Mr. Akshay Makhija, CGSC with Mr. Siddharth Thakur, Mr. Sumant Bhushan and Mr. Shivi Sanyam, Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Ms. G. Rohini, C.J.—The unsuccessful petitioner in W.P.(C) No.1741/2016 is the appellant before us. The said writ petition was dismissed by the learned Single Judge by order dated 02.03.2016.

2. We have heard the learned counsel for both the parties.

3. The appellant/writ petitioner filed W.P.(C) No.1741/2016 with a prayer to quash the order of the respondent No.1/Government of India, Ministry of Coal dated 24.06.2015 whereby the petitioner's representation regarding refund of the amount covered by the bank guarantee which was invoked by the Ministry of Coal on 17.02.2014 was rejected and seeking a mandamus to the respondent No.1 to refund a sum of Rs.55,34,79,500/- covered by the said bank guarantee. The said writ petition was dismissed by the learned Single Judge by the order under appeal dated 02.03.2016 and therefore the present appeal.

4. As could be seen from the material available on record, the appellant/writ petitioner was allocated the North of Arkhpal Srirampur Coal Block in the State

of Odisha for captive mining of coal vide Letter of Allocation dated 27.02.2009 issued by the Ministry of Coal/respondent No.1. In terms of the said Letter of Allocation, the appellant/petitioner furnished a bank guarantee for a sum of Rs.269.99 crores. However, by order dated 17.02.2014, the Ministry of Coal de-allocated the coal block allocated to the appellant/writ petitioner on the ground that the Appellant had failed to develop the coal block as per the prescribed milestones and invoked the bank guarantee to the extent of Rs.55.34 crores.

5. The said order of de-allocation dated 17.02.2014 was challenged by the appellant/writ petitioner by filing W.P.(C) No.1173/2014 along with CM No. 2457/2014 for stay of encashment of bank guarantee upon which this Court granted stay, however, the petitioner was directed to keep the bank guarantee alive until further orders. Subsequently, the appellant/writ petitioner sought permission to withdraw CM No. 2457/2014 and the same was ordered on 24.02.2014. Thus, the application for stay was dismissed as withdrawn and the respondent No.1 was permitted to encash the bank guarantee as per the demand dated 17.2.2014. While making it clear that the interim order granted earlier on 19.2.2014 stands vacated, it was added "that in the event the respondents initiate process of reallocation of the coal mines in question, the petitioner shall be at liberty to approach this Court".

6. While so, the Supreme Court in W.P (Crl.) No. 120/2012 titled Manohar Lal Sharma v. Principal Secretary and Ors. declared the allotment of coal blocks made by the Government during the period 1993-2010 as arbitrary and illegal. In terms of the said decision of the Supreme Court, by common order dated 30.10.2014, this Court disposed of a batch of writ petitions relating to allocation of various coal blocks including that of the appellant's petition i.e., WP (C) No. 1173/2014 holding that no relief for cancelling the de-allocation of the coal blocks can be granted. With regard to the issue of invocation of bank guarantees which were furnished by the petitioners therein, this Court issued the following directions:

"In this view, I deem it appropriate that the present petitions be disposed of with the following directions:

1. That the petitioners would keep alive all bank guarantees that are currently alive in favour of the respondents, for a further period of three months.
2. That the respondents shall take a decision in respect of each individual case whether the bank guarantees ought to be invoked or released within a period of eight weeks from today.
3. The said decision of the respondents would be communicated to the petitioners within a period of one week, thereafter.
4. In the event the respondents decide to invoke the bank guarantee or pursue its encashment, the respondents shall not do so for a further period of two weeks after communicating their decision to the petitioners, to enable the petitioners to

take appropriate action in accordance with law."

7. Having regard to the fact that the bank guarantee furnished by the appellant herein had already been invoked pursuant to the dismissal of CM No. 2457/2014 as withdrawn, the appellant herein filed CM No. 6072/2015 seeking modification of the order dated 30.10.2014. The said application was disposed of by the following order dated 08.04.2015:

"It is the case of the petitioner that its bank guarantees had already been invoked. The petitioner is now seeking that its request for refund of the amount be considered by the Committee constituted by the Ministry of Coal, Government of India, which is also considering the question whether the bank guarantees of other petitioners should be invoked. Since the order dated 30.10.2014 was passed only in respect of the petitioners whose bank guarantees had not been invoked and in view of the fact that the respondent had stated that the issue of bank guarantees was being considered by the Ministry of Coal, Government of India, a modification of the order is not warranted.

However, it would be open for the petitioner to make a representation to the concerned Ministry for the refund of the amount already collected by invocation of the bank guarantees. Needless to mention that if such representation is made it would be considered appropriately; if the petitioner is still aggrieved, it would be open for the petitioner to avail such remedies as available in law.

The application is disposed of with the aforesaid observations."

8. In terms of the said order, the appellant made a representation on 15.05.2015 to the respondent No. 1 for refund of the bank guarantee. The said representation was rejected by the Ministry of Coal by order dated 24.06.2015 stating that the bank guarantee which has already been invoked for not achieving the stipulated milestones cannot be validated on the basis of a subsequent judgment. The said order was challenged in WP No. 1741/2016. The learned Single Judge declined to entertain the writ petition and dismissed the same as not maintainable observing:

"8. In the opinion of this Court, once the respondents were permitted to encash the bank guarantee in question in view of the demand dated 17th February, 2014 at the instance of the petitioner and the application for stay of encashment was withdrawn, how can the petitioner seek its refund today?

9. At this stage, Mr. Jain submits that even in cases where injunctions/stay applications with regard to stay of encashment of bank guarantee have been refused, the aggrieved party has the liberty to seek refund of the amount received by the other party under the bank guarantee. He also submits that as the writ petition challenging the order dated 17th February, 2014 was still pending adjudication after the encashment of the bank guarantee, the petitioner is today entitled to seek refund of the amount received by the respondents after encashment of the bank guarantee.

10. Undoubtedly, where injunctions/stay applications with regard to stay of encashment of bank guarantee have been refused, the aggrieved party can file proceeding for recovery of the amount paid under the bank guarantee. But in the present case, encashment of the bank guarantee was permitted upon withdrawal of the stay application and in view of the demand dated 17th February, 2014. Since challenge to the demand dated 17th February, 2014 qua encashment of bank guarantee was withdrawn, in the opinion of this Court, the petitioner cannot seek refund of the bank guarantee. Moreover, once the bank guarantee had been encashed and the petitioner's mine had been de-allocated vide order dated 17th February, 2014 and the W.P.(C) 1173/2014 had been confined to reallocation, it is not understood as to how the subsequent judgment of the Supreme Court of cancellation of allocation of coal blocks would apply to the petitioner. Consequently, the reliefs sought in the present writ petition are not maintainable. Accordingly, the writ petition along with the applications is dismissed, but with no order as to costs."

9. Assailing the said order, it is contended by Shri Gopal Jain, the learned Senior Counsel appearing for the appellant/writ petitioner that the learned Single Judge failed to appreciate that withdrawal of the application for stay in W.P.(C) No.1173/2014 had no bearing on the final outcome of the said writ petition and, therefore, W.P.(C) No.1173/2014 should have been decided on merits. To substantiate the said submission, the learned Senior Counsel relied upon *National Bal Bhawan & Anr. v. Union of India & Ors.*, (2003) 9 SCC 671 and *Prem Chandra Agarwal & Anr. v. Uttar Pradesh Financial Corporation & Ors.*, (2009) 11 SCC 479.

10. It is also contended that even otherwise the claim of the appellant/writ petitioner for refund of the amount covered by the bank guarantee cannot be rejected in view of the fact that the appellant/writ petitioner has been relegated to its original position by virtue of the order of the Supreme Court quashing the allotment of coal blocks.

11. On the other hand, it is submitted by Shri Akshay Makhija, the learned Standing Counsel for the respondents that since the application for stay in W.P.(C) No.1173/2014 was dismissed as withdrawn and subsequently the writ petition was also disposed of by order dated 30.10.2014, the appellant cannot claim refund of the bank guarantee.

12. As is evident from the order dated 17.02.2014 of the Ministry of Coal, the allocation of the coal block in favour of the appellant/writ petitioner was de-allocated on the ground that the appellant/writ petitioner failed to develop the coal blocks as per the milestones prescribed. The said order was challenged in W.P.(C) No.1173/2014 and pending the writ petition, the encashment of bank guarantee pursuant to the de-allocation order dated 17.02.2014 was stayed vide order dated 19.02.2014 in C.M.No.2457/2014. However, C.M.No.2457/2014 was dismissed as withdrawn by order dated 24.02.2014. Thereafter, by order dated 25.08.2014, the Supreme Court in Manohar Lal Sharma's case (Supra) declared

the allocation of coal blocks during 1993-2010 as illegal and pursuant thereto W.P. (C) No.1173/2014 was disposed of as having become infructuous.

13. Apparently the order dated 17.02.2014 came to be passed by the Ministry of Coal, consequent to which the bank guarantee was sought to be encashed, for an entirely different reason, i.e., the alleged failure of the appellant/writ petitioner to meet the milestones prescribed in developing the coal block. The order of the Supreme Court in Manohar Lal Sharma's case (supra) declaring the allocation of the coal blocks made by the Union of India during the period 1993 to 2010 as arbitrary and illegal was a subsequent event. It may be true that W.P. (C)No.1173/2014 was disposed of as having become infructuous in view of the decision of the Supreme Court in Manohar Lal Sharma's case (supra), however, in our considered opinion, the same does not invalidate the order dated 17.02.2014 since by that time, the Letter of Allotment in favour of the appellant/writ petitioner was very much valid and was in operation. Hence, we do not find any substance in the contention of the learned Senior Counsel for the appellant that in view of the order of the Supreme Court in Manohar Lal Sharma's case (supra) the Letter of Allotment has been rendered void ab-initio.

14. Even otherwise, as held in *Syndicate Bank v. Vijay Kumar*, (1992) 2 SCC 330, the bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. In the said decision, it was made clear:-

"10. It is in common parlance that the issuance of guarantee is what that a guarantor creates to discharge liability when the principal debtor fails in his duty and guarantee is in the nature of collateral agreement to answer for the debt. It is well-settled that the Bank guarantee is an autonomous contract and imposes an absolute obligation on the Bank to fulfil the terms and the payment in the Bank guarantee becomes due on the happening of a contingency on the occurrence of which the guarantee becomes enforceable.

11. Guarantee has been defined in Halsbury's Laws of England, 4th Edn., Vol. 20, page 49, para 101 as: "A guarantee is an accessory contract whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promise must exist or be contemplated."

12. In the banking system it is understood that Bank guarantee has a dual aspect. In the case of a Bank guarantee the banker is the promisor. It is a contract between the Bank and the beneficiary of the guarantee and it is also a security given to the beneficiary by a third party. Now, it is a well-known business transaction in the world of commerce and it has become the backbone of the banking system. Now coming to its enforceability the same depends upon the terms under which the guarantor has bound himself. He cannot be made liable for more than what he has undertaken. Therefore the Bank guarantee, as already noticed, is in the nature of a special contract depending upon the happening of a specific event and when once it is discharged the guarantee

comes to an end. It has to be borne in mind that the obligations arising under the Bank guarantee are independent of the obligations arising out of a specific contract between the parties. Therefore the endorsement of the words "Lien to BG 11/80" cannot have a bearing on the banker's lien on the two FDRs. Merely because on the basis of the security of the two FDRs the appellant Bank gave a guarantee it cannot be said that the banker had only a limited particular lien and not a general lien on the two FDRs. In our view this finding of the High Court is erroneous.

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14. From the above discussion it can be gathered that the Bank guarantees are on different level and they must be allowed to be honoured free from interference by the courts and a Bank which gives a guarantee must honour the same according to its terms and it is only in exceptional cases that the court will interfere with the machinery of irrevocable obligations assumed by the banks. A fortiori the same principle applies in respect of Bank guarantees which are discharged. When once the Bank guarantee is discharged the obligation of the Bank ends and there is no question of going behind such discharged Bank guarantee. The courts should refrain from probing into the nature of the transactions between the Bank and the customer which led to the furnishing of the Bank guarantee."

15. The said principle has been reiterated in *Vinitec Electronics Pvt. Ltd. v. HCL Infosys Ltd.*, (2008) 1 SCC 544 as under:

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In *U.P. State Sugar Corpn. v. Sumac International Ltd.* [(1997) 1 SCC 568] this Court observed that: (SCC p. 574, para 12)

"12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing

the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases."

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Ltd. v. Fenner India Ltd.* [(2006) 2 SCC 728] this Court held: (SCC pp. 733-34, para 10)

"10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court [Ed.: See e.g. *U.P. State Sugar Corpn. v. Sumac International Ltd.*, (1997) 1 SCC 568 at pp. 574-77, paras 12-16; *State of Maharashtra v. National Construction Co.*, (1996) 1 SCC 735 at p. 741, para 13. See also *United Commercial Bank v. Bank of India*, (1981) 2 SCC 766; *Centax (India) Ltd. v. Vinmar Impex Inc.*, (1986) 4 SCC 136.] , that in *U.P. State Sugar Corpn. v. Sumac International Ltd.* [(1997) 1 SCC 568] (hereinafter "*U.P. State Sugar Corpn.* [(1997) 1 SCC 568]") this Court, correctly declared that the law was "settled?."

13. In *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* [(2007) 8 SCC 110 : (2007) 9 Scale 631] this Court summarised the principles for grant of refusal to grant of injunction to restrain the enforcement of a bank guarantee or a letter of credit in the following manner: (SCC pp. 117-18, para 14)

"14. ? (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

16. In a latest decision in *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Ltd. and Anr.*, (2016) 10 SCC 46, it was further explained:

9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "if the contract had frustrated on account of impossibility?" but invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional. No doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

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13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it "without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants?". It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be "conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2-2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first

respondent justifying its inability to perform its obligations under the LoI, etc. are not within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee."

17. In the light of the settled position of law, we are of the view that the encashment of bank guarantee in the present case had given rise to a new cause of action and the Appellant, if aggrieved, has to take recourse to appropriate proceedings for recovery of the amount paid by the Bank.

18. However, we are of the view that the finding recorded by the learned Single Judge that the petitioner cannot seek refund of the bank guarantee since challenge to the demand dated 17.02.2014 qua encashment of bank guarantee was withdrawn, is unwarranted at this stage. It is no doubt true that the subsequent judgment of the Supreme Court in Manohar Lal Sharma's case (supra) had nothing to do with the de-allocation of the appellant's coal block vide order dated 17.02.2014 and the consequential encashment of bank guarantee, however, whether the appellant/writ petitioner is entitled for recovery of the amount paid under the bank guarantee or not is an issue which needs to be adjudicated by the competent Civil Court. Therefore, the question relating to entitlement of the appellant for recovery of the amount paid under the bank guarantee is left open and the appellant/writ petitioner is at liberty to work out the appropriate remedy as available under law.

19. The order under appeal is modified to the extent mentioned above and the appeal is accordingly disposed of.